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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1048

LATIC KEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Latic Key prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on January 12, 1967.

CITATION TO OPINION BELOW

The District Court did not render a written opinion. The opinion of the United States Court of Appeals for the Sixth Circuit was filed on January 12, 1967 and has not been reported. A copy of said opinion is appended hereto as Appendix A.

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered on January 12, 1967. The jurisdiction of the Supreme Court of the United States is involved under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did the District Court err in overruling the petitioner's Motion for a Continuance because the government had failed to respond to defendant's Motion for Bill of Particulars with such specificity as to allow defendant to adequately prepare for trial until after the trial was underway?

STATUTE INVOLVED

The petitioner was indicted under Section 353(b)(1)(B), Title 21, U.S.C., which deals with drugs shipped in interstate commerce, the pertinent provisions of which are:

"(b)(1) A drug intended for use by man which—

* * *

"(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug; . . ."

STATEMENT OF THE CASE

The petitioner along with four other defendants in the Trial Court was charged in a fourteen-count information with the illegal sale of certain drugs within the meaning

of 21 U.S.C., 353(b)(1)(B), which were shipped in interstate commerce into the State of Tennessee. The petitioner was convicted on all fourteen counts and was sentenced to imprisonment for one year each on counts eleven, twelve and fourteen, to be served consecutively and he was fined $500.00 on each of counts one to ten; on count thirteen he was placed on probation for a period of four years, to be consecutive to the term of imprisonment.

On November 3, 1965, the defendant filed a Motion for a Bill of Particulars, to which the government responded perfunctorily on November 4, 1965. The petitioner, contending that the government's response was not made with such specificity as to allow him to adequately prepare for trial, vigorously renewed the motion orally the morning of the trial, November 17, 1965, which was his first opportunity to be heard on the matter. At that time the Court, after discussing the matter with attorneys for the government and the petitioner, required the government to furnish the information sought by the petitioner. The petitioner then moved for a continuance on the ground that the information which was vital to his defense as the Court had just ruled had come so late that he had not been able to adequately prepare for trial and could not proceed to trial immediately. The District Court overruled the motion.

REASONS FOR GRANTING WRIT

Whether the Trial Court's refusal to grant a continuance is an abuse of discretion must be decided in the light of the prejudicial effect suffered by the petitioner as a result of the Court's ruling.

The continuance was needed by petitioner's counsel in order to prepare for trial. The information requested

in the Motion for a Bill of Particulars had to do with the identity of the informers and government agents who bought the drugs and the dates and times of the purchases. The information obviously is necessary for the defendant to know with what offense he is charged, and as to his whereabouts at the time the offense was alleged to have been committed.

It may be stated that basically, the right to continuance is a matter within the discretion of the Trial Court. However, it is also basic that much greater care must be exercised in ruling on motions for continuance in criminal cases than in civil cases.

In essence, the Trial Court in exercising his discretion on the motion for a continuance must base his ruling in a criminal case on whether or not the defendant will get a fair and impartial trial.

In the present case, the information was vague and indefinite as to the times at which the government agents had bought the drugs and as to whom the agents or informers were. It is common knowledge that the agents frequently use aliases when making purchases for the purpose of gaining convictions, and this practice was admitted in this case.

In the present case, the defendant's guilt, if any, depended on the sale of drugs made by another person, not in his presence. Because of this fact it became highly important, and was his right, to know all the details of the circumstances surrounding the purchases.

The Trial Court in ruling on the morning of the trial, that the defendant was entitled to the information sought in order to properly defend himself, recognized the importance of the information. Obviously, however,

the defendant did not at that late hour, have an opportunity to make any sort of an investigation with the information granted.

ARGUMENT

The argument of this question is implicit in the preceding section. And the argument of the question addresses itself to the discretion of this Honorable Court, rather than to specific legal precedents.

The defendant sincerely believes he was deprived of fair and due process of law by the Court's ruling that he was not entitled to time to follow up the information gained on the morning of the trial. This information was in possession of the government only.

The defendant used the only means at his disposal to gain the evidence needed and used diligence in his attempt to gain information which was necessary for his defense.

It, therefore, seems fundamental that if the defendant was legally entitled to have the information, as the Court ruled, he was entitled to a continuance in order to use the information in preparing his defense.

CONCLUSION

It is therefore respectfully submitted that the learned Trial Court and the Honorable United States Court of Appeals for the Sixth Circuit erred in ruling that the defendant was not entitled to a continuance, and that ruling should be reversed, and the cause remanded for a new trial.

Respectfully submitted,

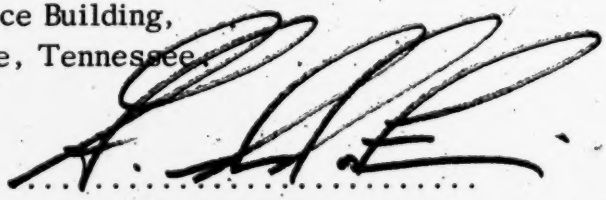
G. EDWARD FRIAR
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, G. Edward Friar, attorney for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Petition were served on the Solicitor General of the United States and on the United States District Attorney for the Eastern District of Tennessee in accordance with Supreme Court Rules 21(1) and 33, by depositing the same in the United States Post Office at Knoxville, Tennessee, with first class mail postage prepaid and addressed as follows:

Solicitor General,
Department of Justice,
Washington, D. C.

Hon. John H. Reddy,
U. S. District Attorney,
Eastern District of Tennessee,
Post Office Building,
Knoxville, Tennessee.



G. EDWARD FRIAR,
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Knoxville, Tennessee,

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FEBRUARY 1967

APPENDIX A

NO. 17,229

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LATIC KEY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided January 12, 1967

Before: WEICK, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

PER CURIAM. The defendant-appellant, Latic Key, was convicted in the United States District Court for the Eastern District of Tennessee, Northeastern Division, on all counts of a fourteen-count information, charging him with causing a drug, amphetamine hychochloride tablets, which had been shipped in interstate commerce, to be dispensed to a government agent without a prescription therefor from a practitioner licensed to administer said drug, in violation of Section 353(b)(1)(B), Title 21, U.S.C.[1]

[1] "(b)(1) A drug intended for use by man which—

* * *

"(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; * * *

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug; * * *

The appellant was sentenced to imprisonment for one year each on counts eleven, twelve and fourteen to be served consecutively and he was fined $500 on each of counts one to ten. On count thirteen he was placed on probation for a period of four years, to be consecutive to the term of imprisonment.

The appellant was the proprietor of a business known as Cloverleaf Truck Stop, located about four miles from Newport, Tennessee. George A. Masters was an inspector with the United States Food and Drug Administration. Successively, on the dates of October 19th, 26th, November 16th and December 4th, of 1964, Masters visited the appellant's truck stop as an undercover agent of the government. He was accompanied by other persons on these visits, and on the occasion of each visit they made purchases of the drug in question. The sales which are the subject of counts one to ten, inclusive, and count thirteen, were variously made by the appellant's wife and three waitresses employed by the appellant. They were all co-defendants of the appellant and were tried jointly with him. The sales which were the subject of counts eleven, twelve and fourteen were made personally by the appellant.

The information charging the appellant, his wife and three waitresses with the illegal dispensings of the above described drug was filed by the United States Attorney on October 8, 1965. The trial was held by previous assignment on November 17, 1965. On November 3rd, counsel for appellant moved for a bill of particulars. The government responded to this motion the following day. Immediately before the trial, on the morning of the 17th, counsel for appellant filed a motion for further particulars. This motion was granted but counsel claimed that it was too late to be of use to him in pre-

paring his defense and moved for a continuance. This motion was denied. Counsel assigns this denial as error. This claim is without merit. Counsel had two weeks to determine that the government's response was insufficient and he cannot be heard to complain on the morning of the trial.

We find no merit to the claim that hearsay testimony of conversations between government witnesses and appellant's co-defendants was admitted into evidence. No motion was made for a severance (Rule 14, F.R.Cr.P.) and necessarily in a joint trial of defendants the evidence against co-defendants must be admitted. There is no claim that the trial judge did not properly instruct the jury that such evidence was not to be considered as to the appellant. *Opper v. United States*, 348 U.S. 84; *Delli Paoli v. United States*, 352 U.S. 232; *Wong Sun v. United States*, 371 U.S. 471; *Glenn v. United States*, 271 F. 2d 880 (C.A. 6); *United States v. Sykes*, 305 F. 2d 172 (C.A. 6), reversed on other grounds, 376 U.S. 364.

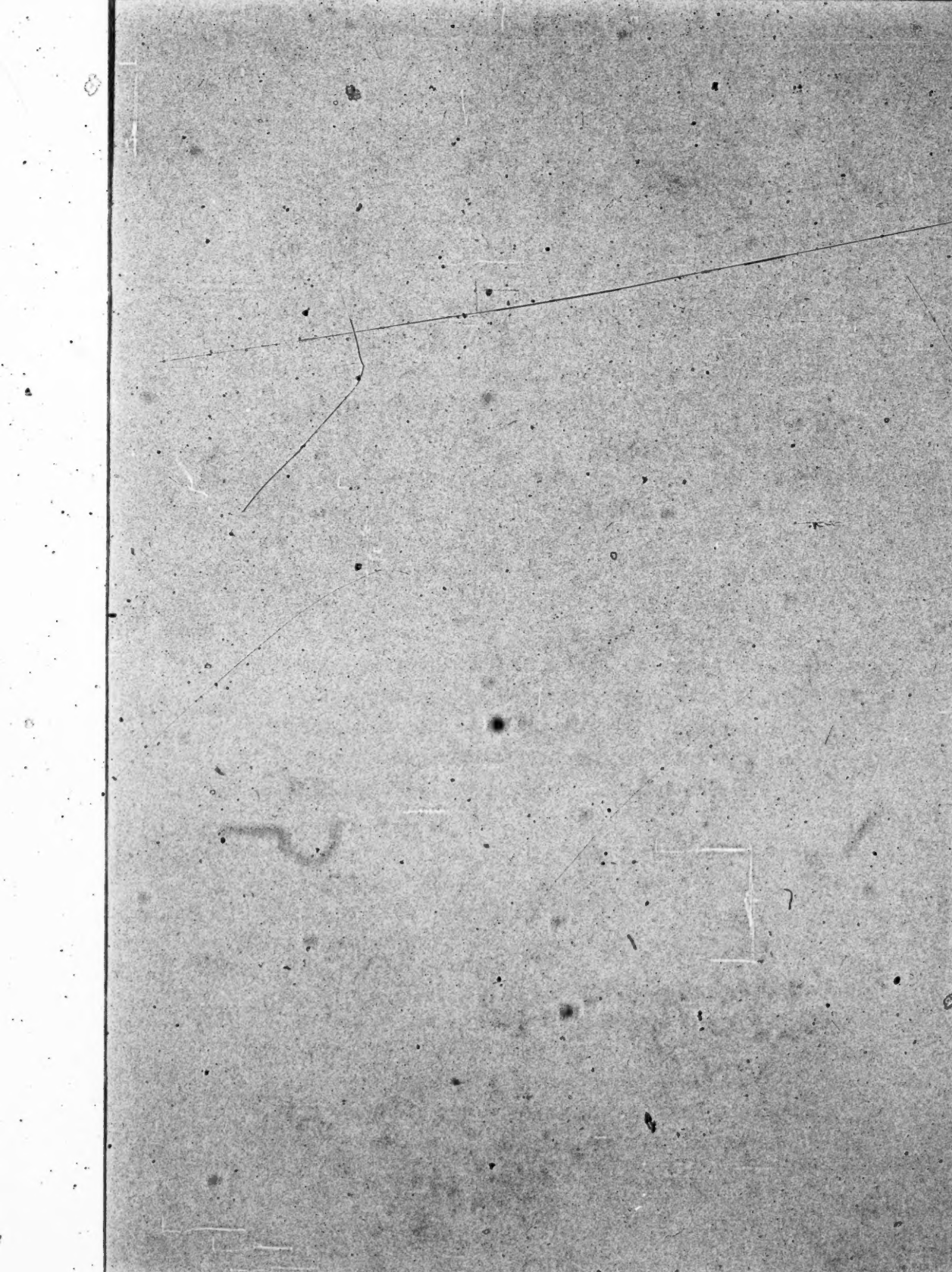
The fourteen counts of the information, upon which the appellant was convicted, arose out of four visits of the government agents to the appellant's place of business and in point of time were from October 19th to December 4th in the year 1964. Significantly, the visits ceased when the appellant himself made a sale on December 4th. The assignment of error with reference to repeated visits is without merit.

Counsel for appellant assigns as error the failure of the government to put an alleged informer on the witness stand to testify on behalf of the government. The evidence upon which the appellant was convicted was secured by government agents personally and was in no way de-

pendent on an informer. Furthermore, it appears that the alleged informer, whose identify was known to the defense, was in the court room during the trial and that counsel for appellant had ample opportunity to interview him. Under the circumstances, the government was not required to put him on the witness stand.

Contrary to the claim of counsel for the appellant, the government proved all of the essential elements of the crime. It was only necessary to prove that the drug in question was shipped in interstate commerce, that it was not safe for use, except under the supervision of a practitioner licensed by law to administer such a drug and that it was dispensed without a prescription from a practitioner licensed by law to administer such a drug.

Judgment of the District Court is affirmed.



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1048

LATIC KEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A fourteen-count information charged petitioner and four co-defendants with unlawfully dispensing and causing to be dispensed misbranded drugs, in violation of 21 U.S.C. 331(k) and 353(b)(1)(B). After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on all counts. On December 21, 1965, he was sentenced to imprisonment for one year on counts 11, 12, and 14, to run consecutively, and fined $500

on each of counts one to ten; on count thirteen petitioner was placed on probation for four years, to run consecutively to the term of imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A.).

The evidence showed that petitioner was the owner of a diner located at the intersection of three highways near Newport, Tennessee (G. 2b).[1] On four occasions between October 19 and December 4, 1964, Food and Drug Inspectors, accompanied by a special employee, Howard Shaver, purchased amphetamine hydrochloride tablets at the diner. The tablets were packaged in coin wrappers which bore no labelling other than a numeral (G. 2b-8b). On the first three occasions the sales were handled by petitioner's wife and three waitresses in petitioner's employ. On December 4, petitioner personally conducted several sales (counts 11, 12 and 14). On October 8, 1965, an information was filed charging petitioner, his wife and the waitresses with illegally dispensing the drugs.[2] Trial was held on November 17-18, 1965. Two weeks before trial, defense counsel filed a motion for a bill of particulars, requesting three items of information, including the time of day of each offense and the names and addresses of all individuals present when the transactions were made (A. 17a-18a). The government filed its reply the next day. It

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[1] Citations are to the Appendix for Plaintiff-Appellee ("G") and Appendix for the Defendant-Appellant ("A"), filed with the Clerk of this Court.

[2] Petitioner's wife and the three waitresses were tried jointly with petitioner. They were convicted and received suspended sentences.

stated the names and addresses of Mr. Shaver and the five government inspectors who had participated in the transactions, but did not list the time of day of each offense (A. 19a). No requests for further information were filed.

At the commencement of trial, defense counsel advised the court that, in his opinion, the government's reply to his bill of particulars was inadequate. He requested that the government disclose whether it was alleging that petitioner was physically or merely constructively present when the sales were made, and whether the individuals listed by the government as being present had used their proper names when effecting the purchases (A. 31a-32a). The court did not make a formal ruling on petitioner's request for more information, but asked the agents and the special employee whether they had used a fictitious name or alias. Each replied that he had used his correct name (A. 32a-33a). The court then asked trial counsel about the time of day of each transaction, and counsel volunteered the information (A. 33a-34a). The prosecution also indicated that it would contend that petitioner was physically present only as to counts 10-14 (A. 34a). Defense counsel then asserted that this information came too late to be of use to him, and he requested a continuance. The court denied the request (A. 35a-36a). This denial is petitioner's sole ground for urging review in this Court. The claim obviously has no merit.

The government's response to petitioner's written motion for a bill of particulars gave petitioner the

essential information regarding the persons participating in the offense. The lateness of the oral application for more information was never explained, and the request could properly have been denied on that ground. The information which the court then elicited from the prosecutor, who apparently was willing to provide it on request, related to unimportant details, not substantial enough to warrant a continuance of the trial. Although petitioner now claims that the denial of a continuance violated his constitutional rights, he made no such claim in his motion for a new trial (A. 22a), and he has never indicated how the granting of a continuance would have changed his defense tactics. Under these circumstances, the denial of a continuance was not an abuse of discretion and does not warrant further review. *Isaacs* v. *United States*, 159 U.S. 487; *Avery* v. *Alabama*, 308 U.S. 444; *Ungar* v. *Sarafite*, 376 U.S. 575; *Jackson* v. *United States*, 330 F. 2d 445 (C.A. 5), certiorari denied, 379 U.S. 821; *Torres* v. *United States*, 270 F. 2d 252 (C.A. 9), certiorari denied, 362 U.S. 921.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

MARCH 1967

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 248895 695